Supreme Court, U.S.

No. 001387 MAR - 6 2001

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IN THE

Supreme Court of the United States

THE WHITLOCK CORPORATION,
formerly known as Apex Automotive
Warehouse, L.P. and The Whitlock Corp.
Petitioner,

v.

DELOITTE & TOUCHE, L.L.P.,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Gerald F. Munitz
Daniel P. Shapiro
Frederick H. Cohen
(*Counsel of record*)
Roger A. Lewis

Counsel for Petitioner

GOLDBERG, KOHN,
BELL, BLACK,
ROSENBLOOM &
MORITZ, LTD.
55 East Monroe Street
Suite 3700
Chicago, Illinois 60603
(312) 201-4000

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ISSUES PRESENTED

Apex Automotive Warehouse, L.P. ("Apex") purchased the stock of The Whitlock Corporation ("Whitlock") from WSR Corporation ("WSR") in January, 1995. On May 28, 1998, Apex filed its Second Amended Complaint adding Deloitte & Touche, L.L.P. ("Deloitte") as an alleged conspirator in a fraud previously alleged against only WSR arising from that purchase. Apex also alleged that Deloitte engaged in a systematic cover-up of its role. The United States Court of Appeals, Seventh Circuit, affirming the decisions of the courts below, ruled that Apex's claims against Deloitte were barred by Illinois' two-year statute of limitations for accountant malpractice, 735 ILCS 5/13-214.2, and that Apex's allegations of a cover-up did not toll the limitations period for a sufficient period of time to save Apex's claims.

(1) Did the Court of Appeals properly determine that the statute of limitations against Deloitte began to run, as a matter of law, no later than April, 1995, when Apex was at most suspicious of its injury and its wrongful cause?

(2) Does inquiry notice with respect to one party trigger the running of the statute of limitations against other, unrelated defendants?

(3) Did the Court of Appeals properly determine that there is no genuine issue of material fact as to the application of the doctrines of equitable estoppel and fraudulent concealment?

CERTIFICATE OF INTEREST

The parties before the Seventh Circuit Court of Appeals and the other courts below were those reflected in the case caption. In addition, WSR Corporation is a named defendant in the case below. WSR Corporation is not a party to this Petition. Whitlock Equity Partners LLC is the parent company of Petitioner The Whitlock Corporation, formerly known as Apex Automotive Warehouse, L.P. and The Whitlock Corporation ("Apex"). No publicly held company owns 10 percent or more of the Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Apex respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, Seventh Circuit, entered in the above titled proceeding on December 7, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Seventh Circuit is reported at 233 F.3d 1063 (7th Cir. 2000) and is Appendix 1. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (Judge Rebecca R. Pallmeyer) is reported at 2000 U.S. Dist. LEXIS 2045 (N.D.Ill. Feb. 17, 2000) and is Appendix 2. The opinion of the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division (Judge Erwin Katz) (the "Bankruptcy Court") is reported at 1999 Bankr. LEXIS 209 (Bankr.N.D.Ill. Mar. 9, 1999) and is Appendix 3. The March 9, 1999 order of the Bankruptcy Court entering final judgment against Apex on its claims against Deloitte and the March 29, 1999 order entering partial final judgment in the adversary proceeding under Fed. R. Bankr. P. 7054 and Fed. R. Civ. P. 54(b) are attached as Appendix 4 and Appendix 5, respectively.

JURISDICTION

The Judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 7, 2000. This Petition for Certiorari is

filed within 90 days of said Judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

Public Accounting, 735 ILCS 5/13-214.2(a) (Smith-Hurd Illinois):

> Actions based upon tort, contract or otherwise against any person, partnership or corporation registered pursuant to the Illinois Public Accounting Act, as amended, or any of its employees, partners, members, officers or shareholders, for an act or omission in the performance of professional services shall be commenced within 2 years from the time the person bringing an action knew or should reasonably have known of such act or omission.

Fraudulent Concealment, 735 ILCS 5/13-215 (Smith-Hurd Illinois):

> If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards.

STATEMENT OF THE CASE

In 1994, WSR decided to sell a portion of Whitlock, one of WSR's several subsidiaries. (R.1, Second Amended Complaint ¶13; Deloitte's Rule 402(m) Statement ¶ 8; R.2, Apex's Rule 402(n) Statement in Response thereto.)[1] Apex, an automotive parts wholesaler, negotiated to buy the operations of approximately 80 of Whitlock's stores (*i.e.*, approximately 75% of the stores), a transaction which ultimately closed on January 27, 1995. (R.4, Tyson Dec. ¶ 2; Pastron Dec. ¶ 4.)

As part of the purchase transaction, the parties agreed that WSR would strip out of the operations of Whitlock the stores that Apex did not want to purchase (approximately 30) prior to the sale so that Apex could purchase its desired portion of Whitlock's operations. (R.4, Tyson Dec. ¶ 3; Pastron Dec. ¶ 7.) Because Apex was acquiring a newly configured Whitlock entity, WSR, as the seller, had to create new, mid-year financial statements to describe for Apex what it would be purchasing. (R.4, Tyson Dec. ¶ 3; Pastron Dec. ¶ 7.) The parties agreed to base the purchase price for the acquisition on these newly-created financial statements. (R.4,

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[1] References to the attached Appendices are preceded by the designation "App." followed by the Appendix number and page number(s). References to the record in the court below will be abbreviated as "R." followed by the docket or item number and the title of the document cited.

Tyson Dec. ¶ 4; Pastron Dec. ¶ 7-8.) Apex believed, both before and until well after closing, that WSR had created financial statements for the transaction without any assistance or input from WSR's outside auditors at Deloitte or otherwise. (R.4, Tyson Dec. ¶ 3-4; Pastron Dec. ¶ 8.)

After the closing of the transaction, WSR was to create a final closing balance sheet that would be audited by Deloitte. (R.5, Stock Purchase Agreement, ¶ 2.4(c) (Apex's Exhibit 20).) That closing balance sheet would be a final accounting by WSR of the "new" Whitlock at the time of the sale and would be used to adjust the purchase price, if necessary, to account for certain changes from the mid-year, unaudited balance sheet. (*Id.*) Apex believed that this was to be Deloitte's first work on the financial statements of the newly-configured entity that Apex purchased. (R.4, Tyson Dec. ¶¶ 3-4; Pastron Dec. ¶¶ 7-8.)

Within a few months of the January, 1995 purchase, WSR created several versions of a closing balance sheet, and disputes arose between Apex and WSR over their accuracy. (R.4, Tyson Dec. ¶ 7; Complaint (Apex's Exhibit 17).) From March, 1995 through that summer, Apex and WSR negotiated the closing balance sheet issues, exchanging a series of demands (by Apex) and attempted explanations (by WSR) about the particular balance sheet items. (R.4, Tyson Dec. ¶7 and Exhibits C, D thereto; Pastron Dec. Exh's A, D, E, G, H.) WSR never delivered to Deloitte a final closing balance sheet for Deloitte to audit. (R.1, Deloitte's Rule 12(m) Statement ¶ 14.)

In early October, 1995, as the balance sheet dispute entered its ninth month, Apex could wait no longer. (R.3, Deloitte's Exhibit 1.) On October 6, 1995, David Carmell, Apex's president and chief executive officer, sent representatives of both WSR and Deloitte a letter attaching a declaratory judgment complaint, which Apex's lawyers had filed the previous day, in an effort to resolve the balance sheet dispute. (*Id.*) In the attached Complaint, Apex sought declaratory relief as to the proper accounting treatment of the disputed categories on the closing balance sheet. (R.5, Complaint (Apex's Exhibit 17).) There was no allegation of fraud or deception in that suit. (*Id.*) At that time, Apex knew of no basis to assert that a fraud had been committed, and could claim only that it had a disagreement with WSR about accounting methods for the closing balance sheet. (*Id.*; R. 4, Tyson Dec. ¶ 14; Pastron Dec. ¶ 12.)

Mr. Carmell specifically noted that Apex did *not* know that either WSR's or Deloitte's conduct had been wrongful in any pre-closing representations made about Whitlock's financial condition, but that it was investigating such potential claims:

> Apex's lawyers are *continuing their investigation into whether WSR and /or Deloitte face liability* for damages arising from (1) an adverse material change in the condition of the business; (2) breaches of representations and warranties with respect to WSR's financial statements; (3) other omissions, errors and irregularities

> in WSR's books, records and audited financial statements; and (4) other breaches of the Stock Purchase Agreement.
>
> Apex is still willing (and would much prefer) to pursue a negotiated settlement and I would encourage you to contact me or my lawyers to discuss (in good faith) a fair resolution to these matters.

(R.3, Deloitte's Exhibit 1) (emphasis added).

In February, 1996, one year after the closing, and a few months after filing its Declaratory Judgment Complaint, Apex and Whitlock filed consolidated chapter 11 bankruptcy petitions. (R.3, Disclosure Statement (Deloitte's Exhibit 2).) As a direct result of the bankruptcies, Apex and Whitlock refocused on the Whitlock transaction and potential liability arising therefrom. (*Id.* at 8-11, 18-23.) Based on this investigation, Apex concluded that WSR had committed fraud, and in October, 1996, Apex filed its Amended Complaint asserting, for the first time, a fraud claim against WSR. (R.5, Amended Complaint (Apex's Exhibit 18).) That claim was based upon WSR's misrepresentations prior to the closing about the financial condition of the carved-out Whitlock entity including particularly misrepresentations in the pro forma balance sheet and store financial statements delivered to Apex by WSR before the closing. (*Id.* at ¶¶ 22, 28-29.) In October, 1996, Apex still had no basis to conclude

that Deloitte had committed fraud. (R.4, Tyson Dec. *passim*; Pastron Dec. *passim*.)

Within one month after filing the Amended Complaint asserting fraud against WSR, Apex served document requests on WSR and various non-parties, including Deloitte. (R.5, Cohen Dec., ¶¶ 2-3 (Apex's Exhibit 21).) Apex was disturbed by what it discovered when it received responsive documents in 1997: First, Apex learned that WSR had *not* acted alone in creating the pro forma balance sheet; Deloitte had helped to prepare the fraudulent financial statements that formed the very basis of the transaction. (R.4, Tyson Dec. ¶ 6, 9; Pastron Dec. ¶ 19.)

Second, Apex learned for the first time that there were actually *two* forms of fraud that had been perpetrated on it. (R.4, Tyson Dec. ¶¶ 6, 9; Pastron Dec. ¶ 19.) One involved the misrepresentations about the actual financial condition of Whitlock prior to closing, which had been the subject of the Amended Complaint, and which Apex now learned Deloitte to be implicated in as well. (*Id.*) The other involved the fact that WSR and Deloitte each knew, prior to the sale of Whitlock to Apex, that WSR's and Whitlock's books and records were grossly unreliable and inaccurate, thus making it *impossible* for WSR to accurately disclose the true financial condition of the carved-out Whitlock to Apex. (R.4, *id.*; R.1, Second Amended Complaint ¶¶ 16-29 (also at R.5, Apex's Exhibit 19).)

Perhaps most disturbing to Apex was its discovery in 1997 that Deloitte had carefully engineered a plot to conceal its role in perpetrating the fraud. (R.4, Tyson Dec. ¶ 6; Pastron Dec. ¶¶ 19-21.) One of Deloitte's primary acts of concealment is found in Deloitte's concealment of the engagement letter for the post-closing audit. (R.4, Tyson Dec. ¶ 6.) Deloitte hid this engagement letter from Apex until document production in 1997. (R.4, Colicchio Dep. at 401 (Apex's Exhibit 4).)

In addition to the concealment of the Engagement Letter, Deloitte continually reinforced Apex's belief that WSR alone was responsible for the financial documents that had described Whitlock for Apex. (R.4, Tyson Dec. ¶¶ 4, 8; Pastron Dec. ¶¶ 13, 17.) When Apex came to Deloitte with questions about Whitlock's financial condition or financial statements, Deloitte feigned ignorance and referred Apex back to WSR for answers. (R.4, Tyson Dec. ¶ 8; Pastron Dec. ¶ 13; *supra* at part (iv).)

As a direct result of the information that it learned through discovery received in 1997, Apex prepared a Second Amended Complaint naming Deloitte as a defendant. (*See* R.4, Apex's Exhibit 1.) Apex sent a draft of this Complaint to Deloitte on April 6, 1998 in an effort to resolve its claims without filing suit. (*Id.*) When those efforts proved unsuccessful, Apex filed the Second Amended Complaint on May 28, 1998. (R.1, Second Amended Complaint (also at R.5, Apex's Exhibit 19).)

On July 6, 1998, Deloitte moved for summary judgment on all of Apex's claims against Deloitte on the basis of Illinois' two-year statute of limitations for accountant malpractice. 735 ILCS 5/13-214.2. This statute of limitations begins to run when the plaintiff "knew or should reasonably have known" that it has been wrongfully injured. *Id.* On March 9, 1999, the Bankruptcy Court issued its Memorandum Opinion granting Deloitte's Motion for Summary Judgment. (App. 3.) The Bankruptcy Court held that the limitations period began to run as a matter of law no later than October 6, 1995, the date that Apex sent a letter to WSR and Deloitte voicing suspicions about certain matters relating to its purchase of Whitlock. The Court entered the Order adopting the Memorandum Opinion on March 29, 1999 (amending the Original Order to include a Rule 54(b) certification). (App.'s 4, 5.)

On March 17, 2000, the District Court (J. Pallmeyer) issued its Memorandum Opinion and Order affirming the Bankruptcy Court's grant of summary judgment for Deloitte. (App. 2.) On December 7, 2000, the Court of Appeals issued its decision affirming the courts below. (App. 1.) The Court of Appeals adopted the Bankruptcy Court's reasoning in dismissing Apex's claims against Deloitte, except that it concluded that the limitations period was triggered even earlier, no later than April 1995, when Apex first "believed that chicanery had occurred in the valuation of Whitlock's inventory." 233 F.3d at 1065-66.

The Bankruptcy Court had jurisdiction in the first instance of this case pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a) and (c), and Local Rule 2.33 of the General Rules of the United States District Court for the Northern District of Illinois.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an appropriate vehicle to resolve an issue of national importance: under what circumstances a court can take the determination of when the statute of limitations period begins to run out of the hands of the trier of fact.

Illinois law establishes the following straightforward answer to this issue: a court can make the determination as a matter of law only when the undisputed facts reveal that the plaintiff, at a particular point in time, *knew or reasonably should have known* that it had been wrongfully injured. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 430 N.E.2d 976, 980 (1981); *Young v. McKiegue*, 303 Ill. App. 3d 380, 708 N.E.2d 493, 499 (1st Dist. 1999), *app. denied*, 184 Ill.2d 575, 714 N.E.2d 533 (1999). An additional requirement applies in situations with multiple wrongdoers. In such cases, the limitations period for the plaintiff's claim against each defendant begins to run as a matter of law no earlier than when the plaintiff knew or reasonably should have known that *the particular defendant* was involved in the events at issue. *LeBlang Motors, Ltd. v. Subaru of America, Inc.*, 148 F.3d 680, 691 (7th Cir. 1998); *Antell v. Arthur Anderson LLP*, 1998 WL 245878

(N.D.Ill. 1998) (J. Andersen). Given the complicated factual issues involved, "fixing a date of discovery that triggers the statute is generally a question of fact inappropriate for summary judgment." *LaSalle National Bank v. Skidmore, Owings & Merrill*, 262 Ill. App. 3d 899, 635 N.E.2d 564, 567 (1st Dist.), *app. denied*, 157 Ill. 2d 503, 642 N.E.2d 1283 (1994) (citing *Knox College, supra*).

In order to affirm the lower courts' decisions, the Court of Appeals decided, first, as a matter of law, that Apex knew or reasonably should have known that it was defrauded prior to May 28, 1996 (two years prior to the filing of the Second Amended Complaint). Second, the Court of Appeals decided as a matter of law that Apex knew or had reason to know by that date that Deloitte was directly involved in the fraud. These inquiries also required a review of the factually-intensive questions of fraudulent concealment and equitable estoppel, each of which is applicable here given Deloitte's participation in a scheme to conceal both the true condition of Whitlock from Apex, and the fact of Deloitte's participation in creating the misleading financials.

Viewing the record in favor of Apex, the non-movant, the most that could be established as a matter of law is that Apex knew that its injury was wrongfully caused when it filed its Amended Complaint alleging fraud against WSR in October, 1996, and knew of Deloitte's involvement in WSR's fraud when it received discovery from Deloitte in 1997. Both of these dates – October, 1996 and 1997 –

are within the two-year period before Apex added Deloitte to the case in May, 1998. Accordingly, the Court of Appeal's decision that the limitations period expired by the time Apex filed its Second Amended Complaint against Deloitte should be reviewed by this Court on writ of certiorari, and reversed.

A. The Court Should Hold that the Court of Appeals Erred in Finding that Apex Knew That Its Injury Had Been Wrongfully Caused Prior to May, 1996.

In this case, prior to May 28, 1996 (two years before Apex filed its Second Amended Complaint), the most that can be determined from the Record is that Apex was suspicious that it may have been defrauded, and had instructed its lawyers to investigate whether it had a cause of action. But Illinois law is clear: *"the statute of limitations is not triggered during that period in which the party is attempting to discover whether [its] injury is wrongfully caused."* *Young*, 708 N.E.2d at 501 (emphasis added). It was not until Apex filed its Amended Complaint against WSR for fraud in October, 1996 that Apex can properly be found, *as a matter of law*, to have had knowledge of its injury's wrongful cause (*i.e.*, WSR's fraud). The material facts prior to this date are hotly disputed. Accordingly, the trigger date for either defendant cannot be determined, as a matter of law on summary judgment, to be any earlier than October, 1996, less than two years before Apex filed its fraud suit against Deloitte.

In *Knox College v. Celotex Corp., supra*, the Illinois Supreme Court reversed a summary judgment that had been granted in favor of a defendant on statute of limitations grounds. The defendant had provided roofing materials, and had also advised the parties that these materials were the functional equivalent of the ones that were called for in the architect's specifications. The court held that the plaintiff's mere knowledge that its roof leaked did not trigger the limitations period as a matter of law on his claim against the supplier of the roofing materials:

> It is true that Knox knew that the roof leaked almost as soon as it was completed. ... We cannot say, as a matter of law, however, that that event started the running of the limitations period. Evidence may disclose that built-up roofs of this type often leak following installation due to some minor defects in the application of the material, which are usually easily corrected. It may be that the nature of the leak and the fact that the subcontractor undertook at once to remedy it were facts which would not cause a reasonable person to investigate further. However, if not the first leak, at some point along the line, Knox had sufficient information to put a reasonable person on inquiry as to the nature of the defect in the roof and whether a cause of action existed in favor of Knox. That point must be determined by the trier of

> fact, and it must determine whether that information was acquired more than 5 years prior to the time that Knox filed suit.

Knox, 430 N.E.2d at 981.

Similarly here, all that Deloitte succeeded in showing in its motion for summary judgment is that Apex had suspicions and was investigating. Like the *Knox* plaintiff, Apex apparently knew that it had "a leaky roof." It is a long stretch, however – one that *Knox* cautions can be undertaken only by the trier of fact – to conclude that, as a matter of law, Apex had sufficient knowledge prior to May, 1996 for the statute of limitations to begin running. At its core, Deloitte's motion for summary judgment argued for a rule of law which would require plaintiffs to file lawsuits prior to concluding that they have been wronged by a defendant. According to Deloitte, once the plaintiff begins its investigation into the defendant's conduct, the limitations period is triggered as a matter of law. This is not the law. The limitations period cannot be triggered as a matter of law without reference to the reasonableness of the plaintiff's conduct in waiting to bring suit, the conduct of the defendant in attempting to hide the cause of action, and the extent of the plaintiff's knowledge of its injury and the defendant's role in causing it. *See Young, Knox College, supra.* All of these analyses are intensely factual, and inappropriate for summary judgment. *Id.*

The lessons of the case law are clear. A suspicious plaintiff – even one who has begun an investigation – does not start the statute running as a matter of law. The Court of Appeals committed reversible error in holding Apex – just such a plaintiff – to a different standard and resolving disputed fact questions to do so.

B. Even if Apex Knew That It Had Been Defrauded By WSR Prior to May, 1996, the Statute of Limitations Against Deloitte Would Begin to Run Later.

Even if it could be concluded that Apex was sufficiently aware of its injury and WSR's participation in a fraud prior to May 28, 1996 (two years before Deloitte was sued), the fact that Apex did not and could not know of Deloitte's involvement in the fraud until much later prevents the limitations period from beginning to run against Deloitte. Where there are multiple participants in a wrongful act, the trigger date for the limitations period for *a particular defendant* runs from when the plaintiff knew or should have known of *that defendant's* involvement in the events surrounding its wrongfully-caused injury. *See LeBlang Motors, Ltd. v. Subaru of America, Inc.*, 148 F.3d at 691; *Antell v. Arthur Anderson LLP*, 1998 WL 245878 at *3-4; *Ventre v. Datronic Rental Corporation*, 1996 WL 681279, *7-10 (N.D. Ill. 1996). Again, this is a factually intensive question, inappropriate for summary judgment. *LaSalle National Bank v. Skidmore, Owings & Merrill*, 635 N.E.2d at 567.

The circumstances in this case are analogous to those in the above-cited cases. Apex's accountants testified that they had no reason to know that Deloitte was involved in providing the fraudulent information. Neil Tyson, Apex's outside accountant, testified:

> As a participant in the transaction, it was my belief and understanding, until I was informed of certain documents produced in discovery in this litigation between Apex and WSR in 1997, that the creation of these "Whitlock West" [the carved-out Whitlock] financial statements was the work of WSR alone. I had no reason to believe, either before or after the acquisition (until 1997), that Deloitte was involved in the preparation of the financial information provided to Apex by WSR.

(R.4, Tyson Dec. ¶3.) Tyson provided extensive explanation in this Declaration about the basis for his belief and understanding. He further testified that as of March, 1996 "I concluded that there was no reason to suspect that Deloitte was liable to Apex because we had no reason to believe that any information provided by Deloitte prior to the Closing (e.g., the January 1994 audit of consolidated WSR, which I saw before the Closing) was wrong." (*Id.* at ¶ 14.) (*See also* R.4, Pastron Dec. ¶¶ 8-9.)

Consistent with *Antell* and *Ventre*, the testimony in the Record supports Apex's argument that the

statute of limitations against Deloitte did not begin to run until Apex obtained documents in discovery revealing Deloitte's involvement in preparing the fraudulent documents that Apex relied upon in purchasing Whitlock. At the very least there are disputed questions of material fact as to whether Apex was sufficiently aware of Deloitte's involvement to trigger the running of the statute. Deloitte's summary judgment motion should have been denied.

Accordingly, the Court of Appeals and the other courts below erred in finding that the limitations period was triggered with respect to Apex's claims against Deloitte at the same time it was triggered against WSR. This Court should review those rulings on writ of certiorari in order to correct the grievous wrong suffered by Apex in losing its claims against Deloitte on the misapplication of the statute of limitations.

C. In the Alternative, Deloitte's Conduct and Representations Led Apex Away From Discovery of Deloitte's Participation in the Fraud, So Deloitte Is Estopped From Asserting the Statute of Limitations.

Even if the Court of Appeals correctly found that the limitations period started prior to May 28, 1996, it erred in deciding under Illinois law that Deloitte was not responsible for fostering a lack of knowledge that delayed the filing of claims against it. Where sufficient facts are alleged that the defendant intentionally concealed facts that delayed

the prompt discovery of the plaintiff's claims, the doctrines of equitable estoppel and/or fraudulent concealment toll the statute until the plaintiff is reasonably able to discover its claims. Here, Deloitte's conduct from 1995 until it finally produced documents in discovery in 1997 raises issues of material fact as to whether these tolling doctrines apply in this case.

Deloitte concealed its true role in this transaction, and diverted the progress of Apex's inquiries away from Deloitte. The Illinois Supreme Court has recognized the unfairness of permitting a defendant to rely on the statute of limitations to bar a claim where the defendant's own conduct caused the plaintiff to delay:

> The defendant is estopped from asserting the limitations bar if the plaintiff's failure to act within the statutory period results from reasonable reliance on the defendant's conduct or representations.

Witherell v. Weiner, 118 Ill. 2d 321, 515 N.E.2d 68, 72-73 (1987) (holding that equitable estoppel applied where "the defendant made representations that tended to alleviate [the plaintiff's] concerns"). *Witherell* noted specifically that "[a]n intent to mislead, deceive or delay is not necessary." *Id.* at 72. Here, Deloitte actively induced Apex to delay, by commission and omission.

In order to justify its affirmance of the courts below, the Court of Appeals had to resolve numerous genuine issues of material fact against

Apex. Resolving genuine issues as a matter of law is itself reversible error. *See Wilson v. Williams*, 997 F.2d 348, 350 (7th Cir. 1993). The error is compounded in this case because the Record reveals that each of these issues supports Apex's position, not Deloitte's. Deloitte should be estopped from invoking the statute of limitations to bar Apex's claims. At the very least, these facts should have precluded summary judgment.

In addition, and in the alternative, Apex's claims against Deloitte are subject to the tolling rules contained in Section 13-215 of the Illinois Code of Civil Procedure. That section provides that a cause of action may be brought within five years of the date the claim is discovered "if the person liable for the claim fraudulently concealed the existence of the cause of such action from the plaintiff." *Foster v. Plaut*, 252 Ill. App. 3d 692, 625 N.E.2d 198, 203 (1st Dist. 1993) (citing 735 ILCS 5/13-215). This five-year rule trumps the limitations period that would otherwise apply, such as the two-year limit on suits against accountants in Section 13-214.2, at issue here. *Id.* Concealment sufficient to trigger the statute is present when the defendant, through affirmative acts, "said or did something to lull or induce the plaintiff to delay the filing of his claim." *Id. See also Serafin v. Seith*, 284 Ill. App. 3d 577, 672 N.E.2d 302, 311-12 (1st Dist. 1996).

As a result of Deloitte's affirmative misconduct described in the Statement of the Case above, the Court of Appeals erred in affirming the courts

below, and its decision should be reviewed on writ of certiorari to correct this error.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: March 5, 2001

Respectfully submitted,

Gerald F. Munitz
Daniel P. Shapiro
Frederick H. Cohen
(*Counsel of record*)
Roger A. Lewis
GOLDBERG, KOHN,
BELL, BLACK,
ROSENBLOOM &
MORITZ, LTD.
55 East Monroe Street
Suite 3700
Chicago, Illinois 60603
(312) 201-4000

Counsel for Petitioner

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APPENDIX 1

THE WHITLOCK CORPORATION, formerly known as Apex Automotive Warehouse, L.P., Plaintiff-Appellant,

v.

DELOITTE & TOUCHE, L.L.P., Defendant-Appellee.

No. 00-1718

United States Court of Appeals
Seventh Circuit

December 7, 2000

Before EASTERBROOK, KANNE, and ROVNER, Circuit Judges.

EASTERBROOK, *Circuit Judge.* In January 1995 Apex Automotive Warehouse, a wholesaler of auto parts, purchased from WSR Corporation the stock of Whitlock Corporation, a retailer of auto parts. As is common in transactions of this kind, the closing price was calculated on the basis of pro forma financial statements that the seller had prepared, and whose accuracy the seller warranted. See *LHLC Corp. v. Cluete, Peabody & Co.*, 842 F.2d 928 (7th Cir. 1988). These hastily prepared statements were to be followed up by a more complete estimate of the assets' value, to be performed by WSR's auditor Deloitte & Touche, with adjustments to the price made accordingly.

Within months Apex encountered financial distress as a result of the transaction, or at least with the price paid for the retail stores and their inventory, and in 1996 it entered bankruptcy, where it reorganized jointly with Whitlock and was merged into a single firm. (The surviving entity has the Whitlock name, but we use Apex in this opinion to avoid confusion.) WSR and Deloitte never tendered a post-closing report to facilitate a price adjustment. The adversary proceeding now before us represents an effort to recover from Deloitte, for the benefit of Apex's creditors, on the theory that Deloitte committed fraud by failing to alert Apex that the Whitlock stock had been overvalued. Apex has disavowed any claim under the federal securities laws, which include not only a one-year statute of limitations but also a three-year statute of repose, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991); *Short v. Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir. 1990), and rests its hopes on the law of Illinois, which the parties agree supplies the rule of decision. For claims under Illinois law against accountants the statute of limitations is two years, 735 ILCS 5/13-214.2(a), commencing when the plaintiff "knew or reasonably should have known" not only of its injury but also that the injury may have had a wrongful cause. See *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415, 430 N.E.2d 976, 980 (1981). Apex added Deloitte to the adversary proceeding in May 1998, so if its claim accrued before May 1996 it has expired. Both the bankruptcy court, 1999 Bankr.

LEXIS 209 (Bankr. N.D. Ill. Mar. 9, 1999), and the district court, 2000 U.S. Dist. LEXIS 2045 (N.D. Ill. Feb. 17, 2000), concluded that the statute of limitations has run and dismissed Deloitte as a defendant. A partial final judgment under Fed. R. Bankr. P. 7054 and Fed. R. Civ. P. 54(b) enables us to resolve Apex's appeal while its suit against WSR continues in the bankruptcy court.

Bankruptcy Judge Katz relied on three principal considerations when granting summary judgment to Deloitte. First, one of Apex's accountants sent its general partner a memorandum in April 1995 stating that "what they did to us was to intentionally mislead you as to how they would value the inventory." That memorandum showed strong suspicion, if not actual knowledge, of both injury and a wrongful cause, starting the period of limitations, the bankruptcy judge concluded. Second, Apex filed suit in October 1995 accusing both WSR and Deloitte of miscalculating the value of certain items that entered into the price Apex paid for the Whitlock stock. Again that suit (soon dismissed because Deloitte's presence as a defendant spoiled diversity of citizenship) revealed suspicion, if not actual knowledge. Third, on October 6, 1995, the president of Apex's general partner sent Deloitte a letter stating, among other things:

> Apex's lawyers are continuing their investigation into whether WSR and/or Deloitte face liability for damages arising from (1) an adverse material change in the condition of the business; (2) breaches

> of representations and warranties with respect to WSR's financial statements; (3) other omissions, errors and irregularities in WSR's books, records and audited financial statements; and (4) other breaches of the Stock Purchase agreement.

This letter, the bankruptcy court concluded, showed that by October 1995 (10 months after the closing) Apex was on inquiry concerning both injury and causation; and because the Illinois statute of limitations starts to run when a reasonable person would have commenced an inquiry, the time for suit expired no later than October 1997. The district court agreed with these conclusions.

Apex's appeal is founded on two legal misconceptions. The first is that in bankruptcy (and diversity) cases federal courts follow state rules about the allocation of issues between judge and jury. They do not; federal rules always control in federal court. *Mayer v. Gary Partners & Co.*, 29 F.3d 330 (7th Cir. 1994). Apex believes that Illinois favors jury decision of disputes about the commencement of the period of limitations. That may be so, but in federal court Fed. R. Civ. P. 56 provides that only a material dispute about an issue of fact requires trial; there is no preference for trial on a dispute that can be resolved by a judge using (materially) undisputed facts. *Celotex Corp. v. Catrett*, 477 U.S. 317(1986); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997).

The second misconception is that the period of limitations starts defendant-by-defendant, rather than injury-by-injury. The period of limitations began to run against WSR no later than April 1995, when (as the accountant's letter of that month shows) Apex already believed that chicanery had occurred in the valuation of Whitlock's inventory. By then Apex not only knew of its injury (about which it learned promptly after the closing in January 1995) but also strongly suspected that its injury had a wrongful cause. But, Apex insists, the April 1995 letter is ambiguous: the word "they" in the statement "what they did to us was to intentionally mislead you" could refer only to actors at WSR. It was in the dark for longer, Apex submits, about Deloitte's role. Maybe so, but if Apex's claim accrued in April 1995, then time started running with respect to *all* potentially responsible persons. See *LeBlang Motors, Ltd. v. Subaru of America, Inc.*, 148 F.3d 680, 690-92 (7th Cir. 1998) (Illinois law); *City National Bank of Florida v. Checkers, Simon & Rosner*, 32 F.3d 277, 283-84 (7th Cir. 1994) (Illinois law); *Central States Pension Fund v. Navco*, 3 F.3d 167, 171 (7th Cir. 1993) (federal common law); *Young v. McKiegue*, 303 Ill. App. 3d 380, 388, 708 N.E.2d 493, 500 (1st Dist. 1999). Apex could have used the ensuing years to determine who was to blame, and of course it did not have to search hard to find Deloitte. Apex has not cited any decision by an Illinois court standing for the proposition that the statute of limitations for a single injury starts to run at different times against different potentially

responsible persons. It does cite decisions by two federal district courts. See *Antell v. Arthur Anderson LLP*, 1998 U.S. Dist. LEXIS 7183 (N.D. Ill. April 30, 1998); *Ventre v. Datronic Rental Corp.*, 1996 U.S. Dist. LEXIS 17501 (N.D. Ill. Nov. 18, 1996). But *Antell*, which was rendered before *LeBlang* and *Young* (and failed to discuss either *City National Bank* or *Navco*), cannot be deemed authoritative, and *Ventre* held only that the commencement of the limitations period with respect to one injury does not start the time with respect to a different injury caused by a different person through a different fraudulent means. Apex's claim concerns a single injury, the allegedly inflated price it paid for WSR's stock in Whitlock.

True enough, tolling rules may extend the time by different amounts with respect to different parties that have behaved differently, and Apex argues that Deloitte fraudulently concealed its role. See generally *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990) (discussing the scope of both equitable tolling and equitable estoppel). Still, the claim against Deloitte accrued, and the clock began to tick, no later than April 1995. It has continued ticking, too, because Apex has adduced no evidence of "concealment," fraudulent or otherwise, by Deloitte. Simple denials of liability do not toll the period of limitations or estop the adverse party to rely on it. *Singletary v. Continental Illinois National Bank*, 9 F.3d 1236 (7th Cir. 1993). Apex does not contend that Deloitte spoliated evidence or lied in response to inquiries; rather its fraudulent-

concealment theory is that Deloitte owed it a fiduciary duty, so that tolling continued until Deloitte came forward with the truth. On this view, the time to sue could be postponed until after the litigation was over, if Deloitte continued to deny culpability. That is not the function of the fraudulent-concealment principle; even a fiduciary is entitled to the benefit of the statute of limitations without a need to confess to wrongdoing. Although Illinois sometimes allows a fiduciary's silence to toll a period of limitations, see *Chicago Park District v Kenroy, Inc.*, 78 Ill. 2d 555, 562, 402 N.E.2d 181, 185 (1980), that possibility does Apex no good, for Deloitte was not its fiduciary. Apex did not hire Deloitte to look out for its interests in the transaction; Deloitte was WSR's auditor, and Apex dealt with WSR at arms' length. As part of the sale WSR and Apex jointly engaged Deloitte to perform certain auditing functions, but Deloitte could not sensibly have served as a fiduciary to both buyer and seller in the transaction, obliged to favor Apex's position over WSR's - and to favor WSR's position over Apex's at the same time.

Deloitte may well have had contractual duties to both principals in the transaction, but adding the word "fiduciary" does not help us understand the nature of these duties or the period within which to initiate litigation about them. Deloitte served as an informational intermediary to a firm that was itself an expert in the auto parts business, so its silence about details that affected the calculation of the purchase price did not amount to fraudulent

concealment. Apex hired a separate accountant to check on Deloitte's work, a step that makes it even harder to see why Deloitte's silence should postpone litigation. Moreover, Apex concedes that Deloitte was not its fiduciary at the time the first set of financial statements (before closing) was prepared, and it is these financials that Apex contends were fraudulent. Apex could not count on any duties Deloitte may have assumed with respect to later transactions or statements to induce a duty of candor with respect to documents prepared earlier. See *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 20, 653 N.E.2d 968, 975 (2d Dist. 1995).

Nor did Deloitte's occasional soothing assurances to Apex create an equitable estoppel that keeps the suit alive. As the bankruptcy court observed, none of the supposedly lulling statements on which Apex now relies occurred after October 1995; by then Apex and Deloitte had adversarial relations. Unless equitable estoppel postponed the time past May 1996, however, the suit is untimely. Like the bankruptcy and district courts, therefore, we find it unnecessary to decide whether some time could be excluded by equitable tolling. No view of the record would entitle Apex to the exclusion of enough time to make a difference.

AFFIRMED

A true Copy:

Teste:

/s/_____
Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX 2

In The United States District Court
Northern District of Illinois, Eastern Division
Dated February 17, 2000

IN RE: APEX AUTOMOTIVE WAREHOUSE, L.P. an Illinois limited partnership, and THE WHITLOCK CORPORATION, a Minnesota corporation, Debtors.	)	No. 96 B 04594 96 B 04596 (Jointly Administered) Adv. Proc. No. 96 A 1123
APEX AUTOMOTIVE WAREHOUSE, L.P. now known as THE WHITLOCK CORPORATION, Plaintiff/Appellant, v. WSR CORPORATION, and DELOITTE & TOUCHE, L.L.P. Defendant/Appellee.	)	No. 99 C 2537 Judge Rebecca R. Pallmeyer

MEMORANDUM OPINION AND ORDER

On October 5, 1995, Apex Automotive, L.P. ("Apex") brought an action seeking a declaratory judgment against Defendants WSR Corporation ("WSR") and Deloitte & Touche L.L.P. ("Deloitte").

On February 22, 1996, Apex filed a voluntary petition for protection under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 et. seq. Shortly thereafter, in April 1996, Apex voluntarily dismissed Deloitte from the declaratory judgment action. In October of 1996, Apex filed an Amended Complaint in the Bankruptcy Court, naming only Defendant WSR and asserting several counts, including a fraud claim. On May 13, 1998, Apex filed a Second Amended Complaint adding Deloitte as a Defendant.[2] The counts against Deloitte were based on Deloitte's alleged active participation with WSR in a fraud perpetrated on Apex in connection with Apex's January 1995 acquisition of a wholly-owned division of WSR, The Whitlock Corporation ("Whitlock"). Deloitte moved to dismiss or for summary judgment on timeliness grounds. In a March 9,1999 Memorandum Opinion and Order (the "Opinion"), the Bankruptcy Court dismissed Apex's claims against Deloitte as barred by the two-year statute of limitations. Apex appeals. Finding no error in the Bankruptcy Court's holding, the court affirms.

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[2] In its initial complaint, Apex asserted that the court had jurisdiction pursuant to 28 U.S.C. § 1332 (diversity jurisdiction). In its Amended Complaint and Second Amended Complaint, Apex asserts that the Bankruptcy Court has jurisdiction over the adversary proceeding pursuant to 28 U.S.C. § 1334(b), on the basis that the adversary proceeding is "related to" the Chapter 11 case of Apex. (Second Amended Complaint ¶ 5.)

FACTUAL BACKGROUND

WSR is a Delaware corporation with its principal place of business in South River, New Jersey. (Complaint far Declaratory Judgment ("Complaint"), ¶ 4.) Deloitte is a Delaware limited liability partnership with its principal place of business in Wilton, Connecticut. (Complaint, ¶ 5.) Apex is an Illinois limited partnership, with its principal place of business in Northlake, Illinois. (Second Amend Complaint ("SAC") ¶¶ 1,9, Bankr. Docket No. 79.) David Carmell ("Carmell", as president of Apex's general partner, effectively owned and operated Apex, a wholesale auto parts dealer. (SAC, Ex. A at 42.) Whitlock was located in Illinois and sold automotive parts through retail stores in the Midwest and Northeast. (SAC ¶¶ 1, 10-11.) In June 1994, Apex first learned that WSR was interested in selling Whitlock, and thereafter began negotiations. (SAC ¶ 31.) On January 27, 1995, Apex purchased the stock of Whitlock from WSR for $24 million pursuant to a Stock Purchase Agreement dated December 6, 1994 (the "Stock Purchase Agreement")[3]. As part of the purchase transaction, Apex and WSR agreed that prior to the sale, WSR

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[3] On February 22, 1996, Apex and Whitlock filed voluntary petitions for protection under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §101 et. seq. On September 24, 1996, Apex and Whitlock emerged from bankruptcy jointly as "The Whitlock Corporation." This opinion continues to refer to Apex and Whitlock by their historical names to avoid confusion.

would strip about thirty of the retail auto parts stores out of the assets of Whitlock[4]. The Agreement required that, after closing of the transaction, WSR was to prepare a balance sheet which accurately reflected the value of Whitlock as of the closing date of the transaction. WSR provided to Apex an unaudited, pro forma[5] balance sheet for Whitlock which the parties attached to the Stock Purchase Agreement.

The Stock Purchase Agreement also provided that within ninety days after closing, WSR would prepare a balance sheet that reflected the actual financial position of Whitlock as of the closing date. (SAC Ex. A ¶ 2.4(a).) The parties agreed that this closing balance sheet would be audited by Deloitte and that any difference between this balance sheet and the unaudited balance sheet would support an adjustment in the $24 million purchase price paid by Apex. Apex and WSR agreed that the costs and expenses for Deloitte's services in conducting the audit would be shared equally by both. WSR,

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[4] So states the Bankruptcy Court opinion. This court was unable to find such a provision in the parties' agreement. The parties do not explain whether WSR intended to retain these stores or sell them to another entity after "stripping" them from the Whitlock assets.

[5] The phrase "pro forma" is used to describe accounting, financial, and other statements or conclusions based upon assumed or anticipated facts. BLACK'S LAW DICTIONARY, 1212 (6th ed. 1991).

however, never delivered the audited closing balance sheet to Apex. (SAC ¶ 61.)

Shortly after the closing of the transaction, problems developed. Apex declared the following in its bankruptcy proceeding: "Almost immediately after the Acquisition, Apex found that the Acquisition had placed it and Whitlock into severe financial trouble for the simple reason that Apex had paid too much for Whitlock." (Disclosure at 7, Ex. 2 to Deloitte Mem.) On or about April 25, 1995, Neal Tyson ("Tyson"), an outside accountant for Apex, sent a memorandum to Carmell stating that Tyson had "come to the conclusion that what they did was to intentionally mislead you as to how they would value the inventory." (April 25, 1996 Mem. from Tyson to Carmell at 1, Ex 4. to Deloitte Mem.) Apex and Deloitte dispute the identity of the persons referred to by Tyson as "they"; Deloitte contends that "they" refers to Deloitte, but Apex insists the term is ambiguous. Tyson's memo includes a recommendation that Apex consult its lawyers.

On October 5, 1995, Apex filed its initial Complaint, case number 95 C 5713, in the United States District Court for the Northern District of Illinois, before Judge Marovich, seeking declaratory judgment against WSR and Deloitte regarding the appropriate manner of calculating certain items necessary to determine the closing book value of Whitlock. The following year, in April 1996, Apex voluntarily dismissed Deloitte from the action. Deloitte asserts that Apex dismissed it from the suit in order to preserve diversity jurisdiction in federal

court.[6] Apex contests this assertion claiming it "did not maintain a suit against Deloitte in any forum because it had no factual basis to do so or belief that such a suit was justified." (Plaintiff-Appellant's Brief In Support Of Its Appeal ("Appellant's Appeal Brief"), at 7.)

On February 22, 1996, Apex and Whitlock filed voluntary petitions for protection under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §101 et. seq. In October 1996, Apex filed an Amended Complaint, in Bankruptcy Court before Judge Katz, asserting jurisdiction pursuant to 28 U.S.C. 1334(b) as a matter "relating to" Apex's Chapter 11 case. The Amended Complaint stated several claims, including a fraud claim against WSR. In November of 1996, Apex served document requests on WSR and various third parties, including Deloitte. (Cohen Dec., ¶¶2-3 (Exhibit 21).) In 1997, through the responses to these discovery requests, Apex contends that it first learned that Deloitte allegedly had helped to prepare the alleged fraudulent financial statements that formed the basis of the initial transaction. (Appellant's Appeal Brief, at 9.)

On May 13, 1998 Apex sought leave to file a Second Amended Complaint adding Deloitte as a defendant. The Second Amended Complaint

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[6] Although neither party has addressed the issue, the court notes that a claim of diversity jurisdiction here would require Apex to allege the citizenship of each of Deloitte's partners. *See Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314, 316 (7th Cir. 1998).

includes five counts against Deloitte: fraud, negligence/accounting malpractice, breach of contract, breach of fiduciary duty, and conspiracy to defraud. Apex alleged that WSR and Deloitte each knew, prior to the sale of Whitlock to Apex, that WSR's and Whitlock's books and records were grossly unreliable and inaccurate. Apex alleged that Deloitte made false representations and omitted material information regarding Whitlock's financial condition, inventory and internal controls in order to induce Apex to purchase Whitlock at an inflated price. Apex also alleged that Deloitte and WSR improperly failed to provide Apex with the closing balance sheet called for by the purchase agreement. (SAC ¶¶ 62-67, 105, 138(a).) Apex further alleged that Deloitte orally contracted with Apex to provide, prior to the closing, impartial advice and information about Whitlock, and that Deloitte breached that alleged oral contract. (SAC ¶¶32, 118-20, 129-30.) Apex alleged further that after the closing of the transaction, WSR and Deloitte participated in a scheme to continue to conceal the true condition of Whitlock from Apex. Lastly, Apex alleges that Deloitte had a fiduciary duty to disclose to Apex information concerning any inaccuracies in Whitlock's financial statements.

Deloitte filed a motion to dismiss or for summary judgment arguing that the applicable two-year limitations period that applies to actions against public accounting firms, 735 ILCS 5/13-214.2(a), had expired and thus Apex's claims against it were time barred. To support its argument, Deloitte primarily

relies on an October 6, 1995 letter from Carmell addressed to WSR and Deloitte. The letter provides in part:

> Apex's lawyers are continuing their investigation into whether WSR and/or Deloitte face liability for damages arising from (1) an adverse material change in the condition of the business; (2) breaches of representation and warranties with respect to WSR's financial statements; (3) other omissions, errors and irregularities in WSR's books, records and audited financial statements; and (4) other breaches of the Stock Purchase Agreement.

(October 6, 1995 Letter from Carmell at 2, Ex. 1 to Deloitte Mem.) Deloitte argued that the letter evinces Apex's awareness of possible claims arising from Deloitte's conduct as early as October 1995. Deloitte argues that no later than October 1995 the statute began to run and that it expired in October 1997, two years later. Accordingly, Deloitte contended that Apex's May 1998 suit against Deloitte was filed after the two-year statute of limitations had expired.

Apex contends that in October 1995 it did not and could not have known enough about Deloitte's complicity in the fraud to trigger the limitations period as a matter of law. According to Apex, it was not until 1997, when documents were produced in response to discovery requests, that Deloitte's participation in fraud was revealed. Alternatively, Apex submits that the statute of limitations should be suspended or tolled even if the accrual date had

passed pursuant to either the doctrine of equitable estoppel or fraudulent concealment.

In a March 9, 1999 Memorandum Opinion and Order ("the Opinion"), Judge Katz held that all of Apex's claims against Deloitte were time-barred because Apex was on inquiry notice of its alleged claims against Deloitte by October 6, 1995 - more than two years before filing suit against Deloitte -- and therefore granted Deloitte's motion for summary judgment on all counts. (Opinion at 15, Bankr. Docket No. 122.) In reaching his conclusion, Judge Katz considered numerous cases cited by the parties but relied primarily on *LeBlang Motors, Ltd., v. Subaru of America, Inc.*, 148 F.3d 680 (7th Cir. 1998). In *LeBlang*, the plaintiff purchased a Subaru franchise and learned soon afterwards that some of the market information about the franchise that Subaru had provided was inaccurate. *LeBlang*, 148 F.3d at 683. LeBlang sought legal counsel and sued Subaru. *Id.* at 691. Several years later, LeBlang attempted to add two new defendants -- the Subaru employees who had supplied LeBlang with the alleged misrepresentations. LeBlang alleged that his Illinois common law fraud action against the employees did not accrue until after he learned through discovery that the employees were aware that the information they had provided was false. *Id.* Judge Katz interpreted *LeBlang's* holding as follows:

The court held that the fraud action accrued against 'all potential defendants' when the plaintiff learned that information it had received before the

acquisition was false. The court rejected the plaintiff's argument that its claims had accrued only against the company but not against the two individual defendants, until it learned, through discovery, of the two late-added defendants' complicity in the company's fraud.

Judge Katz applied his interpretation of *LeBlang* to the case at bar and concluded,

Under *LeBlang,* Apex's claims against Deloitte and all potential defendants began to accrue by October 1995, when Apex sent the letter to WSR and Deloitte stated that it was investigating their potential liability. This letter established that Apex believed at the time that it had been injured, and believed that the injury was caused by *inter alia* omissions, errors, irregularities and breaches of representations with respect to WSR's financial statements. Therefore, Apex knew both that an injury had occurred and that it was wrongfully caused; this knowledge is all that it is required for the statute of limitations to begin running in Illinois. That Apex believed that WSR misrepresented the financials of Whitlock is sufficient; this awareness triggered an obligation to inquire further to determine whether an actionable wrong was committed."

A thorough investigation mandates that Apex consider the potential liability of all parties involved in supplying the financial information. Deloitte was one such party; therefore, it should have been included in Apex's investigation.

. . . [W]hen there was a problem with the financial statements, Apex had a duty to investigate all the parties that had prepared financial information that Apex had relied upon. Apex's cause of action accrued against both WSR and Deloitte in October 1995. Apex did not have the right to wait until years later, when pretrial discovery uncovered information that may have supported a cause of action against Deloitte.

In re Apex Automotive Warehouse, L.P., 1999 WL 132849 *4-5 (Bankr. N.D. Ill. March 9, 1999). Additionally, the Bankruptcy Court rejected Apex's arguments that the doctrines of fraudulent concealment and equitable estoppel tolled the limitations period.

On April 8, 1999, Plaintiff-Appellant Apex timely filed its Notice of Appeal of the Bankruptcy Court's Memorandum Opinion and Order. The court now considers Appellant's appeal.

DISCUSSION

Standard of Review

This court reviews the Bankruptcy Court's legal conclusions *de nova* and its factual findings for clear error. *In re Cult Awareness Network, Inc.*, 151 F.3d 605,607 (7th Cir. 1998); *see also* FED. R. BANKR. P. 8013. Clear error means that "although there is evidence to support the findings, the court is left with the definite and firm conviction that a mistake has been committed." *Matter of Robert Sheridan*, 57 F.3d 627, 633 (7th Cir. 1995).

Summary judgment in bankruptcy proceedings is governed by Federal Rule of Bankruptcy Procedure 7056(c), which incorporates Rule 56(c) of the Federal Rules of Civil Procedure without amendment. This court will uphold the summary judgment where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Matter of Lefkas General Partners, Numbers 1017, 1018 & 1020,* 112 F.3d 896, 900 (7th Cir. 1997) (citations and internal quotations omitted). The court reviews the record "in the light most favorable to the non-moving party," and will affirm if no reasonable jury could find in Apex's favor. *Ill. Conf. of Teamsters v. Steve Gilbert Trucking,* 71 F.3d 1362, 1364 (7th Cir. 1995).

Analysis

Apex basically raises two issues on appeal. First, it challenges whether the Bankruptcy Court correctly determined when the two-year Illinois statute of limitations applicable to actions against accounting firms begins to run. Second, it challenges whether the Bankruptcy Court correctly determined that neither the doctrine of fraudulent concealment nor equitable estoppel tolled the limitations period.

Two-Year Statute of Limitation

The parties agree that Illinois law governs this action. Section 214.2 of the Illinois Code of Civil

Procedure, 735 ILCS 5/13-214.2[7] provides a two-year limitations period for suits against accountants, and a codification of the "discovery rule," which establishes when many common law causes of action accrue under Illinois law. *See Knox College v. Celotex Corp.*, 88 Ill.2d 407, 416, 430 N.E.2d 976, 980 (1981). Although the determination of when the statute of limitations begins to run is ordinarily a question of fact for the jury, the Illinois Supreme Court has noted that this is not always so. *Witherell v. Weimer*, 85 Ill.2d 146, 156, 421 N.E.2d 869, 874 (1981) "Where it is apparent from the undisputed facts . . . that only one conclusion can be drawn, the question becomes one for the court." *Id.* The limitations period begins to run when a person (1) knows or reasonably should know of his injury, and (2) knows or reasonably should know that it was wrongfully caused. *Id.* The phrase "wrongfully caused" does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause of action. Rather, the term refers to that point in time when "the injured party becomes possessed of sufficient information concerning his or her injury and its cause to put a

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[7] Section 214.2(a) provides that "[a]ctions based upon tort, contract or otherwise" against any public accountant or accounting firm "for an act or omission in the performance of professional services shall be commenced within 2 years from the time the person bringing an action knew or should reasonably have known of such act or omission." 735 ILCS 5/13-214.2(a).

reasonable person on inquiry to determine whether actionable conduct is involved." *Id.*

On appeal, Apex first argues that the Bankruptcy Court erred in concluding that the limitations period began to accrue by October 1995, when Apex advised WSR and Deloitte that it was investigating their potential liability. Apex contends that this event was not sufficient to "justify a ruling as a matter of law that the limitations period had started to run." (Appellant's Appeal Brief, at 12.) As noted, the October 1995 letter stated that "Apex's lawyers were continuing their investigation into whether WSR and/or Deloitte face liability" and identified four areas of potential wrongdoing including "breaches of representation and warranties with respect to WSR's financial statements," and "other omissions, errors and irregularities in WSR's books, records and audited financial statements." (October 6, 1995 Letter from Carmell at 2, Ex. 1 to Deloitte Mem.) Apex characterizes this letter as merely an expression of suspicion that Deloitte had engaged in wrongdoing. (*Id.* at 11.)[8]

In support of its contention that the statute did not begin to run until years later, Apex submits a recent Illinois case, *Young v. McKiegue,* 303 Ill.App.3d 380, 708 N.E.2d 493 (1st Dist. 1999). In *Young,* a wrongful death action, plaintiff was

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[8] Apex argues alternatively that the letter does not establish that Apex was suspicious. Rather, it claims, the letter should be interpreted as mere "bluster to encourage settlement discussion." *(Id.)*

suspicious of medical care providers at the time of her husband's death on September 4, 1993 at Olympia Fields Osteopathic Medical Center ("Olympia"). *Id.* at 382, 708 N.E.2d at 496. Plaintiff contacted an attorney, who requested decedent's medical records and forwarded them to two medical experts for review. *Id.* at 384, 708 N.E.2d at 497. One expert provided a report on August 17, 1994, concluding that "the physicians caring for [the decedent] deviated from the standard of care by not recognizing that his increasing respiratory distress which occurred on September 3 was cardiac in nature." *Id.* On February 16, 1995, the second expert concluded, similarly, that the decedent "would have had a far better chance of survival had [the] deviations from the standard of care not have been made." *Id.* With the information from the two reports in hand, plaintiff filed her complaint on March 3, 1995 against Olympia Fields and several of the hospital's doctors based upon their alleged malpractice in failing to diagnose and properly treat the decedent's cardiac condition. *Id.* In a fourth amended complaint, filed July 24, 1996, plaintiff added Dr. McKiegue as a defendant, alleging she first became aware of Dr. McKiegue's involvement in the treatment of the decedent on June 19, 1996, when during discovery one of the original defendant doctors identified Dr. McKiegue as the attending physician for the decedent on September 3 and 4, 1993. Plaintiff amended her complaint a final time on February 13, 1997 adding two new defendant physicians. In this last amended

complaint, plaintiff alleged she first discovered the involvement of these last named physicians on February 5, 1997, when Dr. McKiegue stated in his deposition that they were the physicians on call on the evening of September 3, 1993, and the morning of September 4, 1993. *Id.* at 385, 708 N.E.2d at 498.

A central issue to be decided in *Young* was when the two-year statute of limitations for the medical malpractice action began to accrue, specifically, when the plaintiff knew that her injury had been "wrongfully caused." Plaintiff maintained that the limitations period did not accrue until she received the second expert's report on February 16, 1995.

Defendants countered arguing that the limitations period began to accrue in December 1993 when "entertaining suspicions concerning the care provided the decedent, [plaintiff] received the hospital's medical records and retained a lawyer for purposes of investigating a lawsuit on her behalf." *Id.* at 388, 708 N.E.2d at 500. In the alternative, defendants argued that plaintiff knew or should have known her husband's death may have been wrongfully caused in August 1994 when her lawyer received the first medical expert report. *Id.*

In concluding that the limitations period began to accrue when plaintiff's attorney received the written report from the first expert, the Court reasoned that the findings set forth in that report were sufficient to place her on notice that the decedent's death was likely caused by negligent medical care.... Receipt of [the first expert's] report in August of 1994,

obligated plaintiff to investigate further to determine whether actionable conduct was involved and, within two years of that time, file a cause of action, if viable, against any and all potentially liable parties.

As a matter of law, the two year statute of limitations commenced to run no later than August 17, 1994 when the first expert report was received.

Id. at 389, 708 N.E.2d at 500. The court rejected defendants' contention that plaintiff's suspicions of malpractice were per se sufficient to charge her with both actual and constructive knowledge that her husband's death was wrongfully caused. The court stated,

> when a party knows or reasonably should know that her injury was wrongfully caused does not mean when a party is suspicious that her injury was wrongfully caused. Thus, the statute of limitations is not triggered during that period in which the party is attempting to discover whether her injury is wrongfully caused. Instead, the limitations period commences when the party possesses enough information concerning her injury to apprise a reasonable person to the need for further inquiry to determine whether a legal wrong has been committed.

Id. at 382, 708 N.E.2d at 501.

In the case at bar, Apex argues that the Bankruptcy Court erred in concluding that the statute of limitations period began to accrue in October 1995 when Apex sent the letter from Carmell to WSR and Deloitte. (Appellant's Appeal Brief, at 15.) Apex asserts that the Carmell letter only evinces that it was suspicious of Deloitte's wrongdoing, and that under *Young,* such suspicions are insufficient to trigger the statute of limitations. (Appellant's Appeal Brief, at 11.)

In this court's view, the October 1995 letter was more than an expression of suspicion. The letter is directly addressed to both WSR and Deloitte and unambiguously states that Apex was investigating Deloitte's potential liability for misrepresentation and contract claims. The Bankruptcy Court correctly concluded that this letter is sufficient to demonstrate that Apex had inquiry notice of its claims: the statute begins to run as soon as the plaintiff knows or reasonably should know of his injury, and also knows or reasonably should know that the injury was wrongfully caused. *City Nat'l Bank v. Checkers, Simon & Rosner,* 32 F.3d 277, 281-83 (7th Cir. 1994).

In *City Nat'l Bank,* the Seventh Circuit affirmed the district court's dismissal of a fraud claim as untimely pursuant to the Illinois two-year statute of limitations for actions against accounting firms. *Id.* at 284. There, a borrower's financial statements, prepared by defendant accounting firm, repeatedly set forth that the borrower had a net worth ranging between $24.6 million (in 1987) and $29.4 million (in 1988). *Id.* at 283. Plaintiff bank relied on these

financial statements and in March of 1989 agreed to lend $500,000 to the borrower. *Id.* Despite his alleged enormous net worth, borrower was unable to repay the loan when it came due. Following three extensions of time the bank declared a default on July 26, 1990. *Id.* at 284.

In the spring of 1991, the borrower sought bankruptcy protection. *Id.* at 279. The bank challenged the dischargeability of borrower's debt and filed an adversary proceeding in bankruptcy court, alleging that borrower had committed fraud. *Id.* On March 26, 1992, plaintiff bank's attorney deposed a member of the defendant accounting firm and learned for the first time that the firm had knowledge of the false, misleading and grossly exaggerated nature of the representations contained in borrower's financial statements. *Id.* at 280. On September 29, 1992, plaintiff filed a fraud and negligence action against the accounting firm arguing that its cause of action against the firm did not accrue until March of 1992. *Id.* at 281. The bank claimed that prior to the deposition, it did not and could not reasonably have known of defendant's wrongdoing. *Id.*

The district court held, and the Seventh Circuit affirmed, that the bank's cause of action against the accounting firm accrued on July 26, 1990, the day borrower defaulted on the loan. Plaintiff's September 29, 1992 lawsuit was therefore time barred. *Id.* at 283. The Seventh Circuit commented:

A thorough investigation mandates that the bank consider the potential liability of all parties involved in [the bank's] process of making the loan to borrower, and obviously the accounting firm which prepared the financial statements upon which the bank relied should have been included in that investigation...

We hold that as of July 26, 1990, [the bank] was on notice of the need for it to investigate whether it had a cause of action against [the accounting firm] for any damages incurred by reason of [borrower's] default.

Id. at 284.

Similarly in the instant case, the court holds that Apex was on inquiry notice by October 1995, when Apex sent the letter to WSR and Deloitte stating that it was investigating their potential liability. A plaintiff need not discover that it has a specific cause of action against a specific defendant for the limitations period to commence. *Knox College,* 88 Ill.2d at 416, 430 N.E.2d at 980. "The phrase 'wrongfully caused' does not mean. . . knowledge of the existence of a cause of action." *Id.* at 388, 708 N.E.2d at 500; *see also Fujisawa Pharm. Co. v. Kapoor,* 115 F.3d 1332,1335 (7th Cir. 1997) ("the facts that put the victim of the fraud on notice can fall short of actual proof of fraud"). Although Apex might not have fully completed its investigation against Deloitte by October 1995, the court concludes it had sufficient information concerning its injury to apprise a reasonable person that further inquiry was

needed to determine whether a legal wrong had been committed. *Id.* at 388, 708 N.E.2d at 501.

For similar reasons, the court also holds that the Bankruptcy Court correctly interpreted and applied the *LeBlang* case. Apex contends that the "Bankruptcy Court erred in reading *LeBlang* to stand for the proposition that the limitations period for *all* defendants - regardless of their connection to a fraud -- begins upon the plaintiff's actual knowledge of having been defrauded." (Plaintiff-Appellant's Brief in Support of Its Appeal, at 17.) Apex has misinterpreted the Bankruptcy Court's opinion. In *LeBlang,* the Seventh Circuit affirmed the dismissal of claims against two individuals added later as defendants to an existing fraud action. The court held that the statute of limitations for the fraud action accrued against "all potential defendants" at the moment when the plaintiff learned of the original defendant's misconduct. The Bankruptcy Court, citing *LeBlang* ruled

> A thorough investigation mandates that Apex consider the potential liability of *all parties involved* in supplying the financial information. Deloitte was one such party; therefore, it should have been included in Apex's investigation.

(Opinion, at * 4.) (emphasis added) Thus, when Apex discovered inaccuracies in the financial statement, Apex had a duty to investigate all the parties that had prepared the statements. The language in the October 1995 letter demonstrates

that Apex knew or should have known that Deloitte was one of those parties.

Equitable Estoppel and Fraudulent Concealment

Apex argued, in the alternative, that the doctrines of equitable estoppel and fraudulent concealment operate to toll the running of the limitations period for Apex's alleged claims against Deloitte, charging that Deloitte had engaged in certain affirmative acts of concealment. The Bankruptcy Court held that Apex failed to come forward with legally sufficient evidence establishing that Deloitte had engaged in affirmative acts invoking these tolling doctrines. Again, this court agrees.

The Illinois fraudulent concealment statute provides:

> If a person liable to an action fraudulently conceals the cause of such action the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of actions, and not afterwards.

735 ILCS 5/13-215. In order to invoke the doctrine of fraudulent concealment, "there must be affirmative acts or representations which are calculated to 'lull or induce a claimant into delaying filing of his claim or to prevent a claimant from discovering his claim.'" *Smith v. Cook County Hosp.*,

164 Ill.App.3d 857, 862, 518 N.E.2d 336, 340 (1st Dist. 1987).

Equitable estoppel is a doctrine that tolls the running of a statute of limitations during any period in which the defendant took active steps to prevent the plaintiff from suing. *Singletary v. Continental Ill. Nat'l Bank & Trust Co.*, 9 F. 3d 1236, 1241 (7th Cir. 1993). The steps taken must have been affirmative efforts to delay the plaintiff from bringing suit before the statute of limitations has run. *Id.* Actions such as promising the plaintiff not to plead the statute of limitations pending settlement talks or actively concealing evidence constitute affirmative efforts sufficient to toll the statute. *Id.* Mere denial of liability or refusal to cooperate in making the plaintiff's case is insufficient. *Id.*

Apex claims the doctrines of equitable estoppel and fraudulent concealment are available here for three reasons: (1) Deloitte's failure to inform Apex of its involvement amounts to an affirmative act of concealment due to Deloitte's fiduciary duty owed to Apex; (2) Deloitte concealed the terms of Deloitte's engagement letter with WSR concerning the issuance of Whitlock's post-closing balance sheet; (3) Deloitte response to Apex's inquiries in spring of 1995 about accounting issues and the closing balance sheet were affirmative acts of concealment. The court here reviews these claims and after careful consideration affirms the Bankruptcy Court's findings.

First, Apex claims "as a result of Deloitte's expertise and its relation of trust and confidence with Apex, Deloitte owed Apex a fiduciary duty." (Appellant's Appeal Brief, at 22.) Apex asserts that Deloitte breached this duty by remaining silent as to its involvement in the preparation of Whitlock's financial statements. (*Id.*) To support its claim that a fiduciary duty was owed, Apex alleges that Deloitte presented itself as the "honest broker and facilitator" and as an accounting firm with expertise in the field. (*Id.* at 21.)

Deloitte counters Apex's contention that it owed a fiduciary duty to Apex by claiming it was an independent auditor, and had not exercised any dominance or superiority over Apex. Deloitte cites the applicable General Accepted Auditing Standards arguing that "an auditor who is required by professional standards to maintain independence and impartiality cannot simultaneously be that client's fiduciary." (Appellee Deloitte & Touche LLP's Brief in Opposition to the Appeal of The Whitlock Corporation ("Opposition Brief"), at 23.) Deloitte argues that "Apex's conclusory allegations that it trusted and reposed confidence m Deloitte [were] insufficient to give rise to a fiduciary relationship." (Opposition Brief, at 24.)

The Bankruptcy court, in concluding that no fiduciary relationship existed, stated

> [T]hat one party trusts another is insufficient to create a fiduciary relationship. "We trust most people with

> whom we choose to do business." *Pommier v. Peoples Bank Marycrest,* 967 F.2d 115, 119 (7th Cir. 1992).

(Opinion, at *6.) Contrary to Apex's contentions, the fact that it had trust and confidence in Deloitte as its independent advisor, is insufficient to create a fiduciary duty. *RTC v KPMG Peat Marwick,* 844 F.Supp 431, 436 (N.D. Ill. 1994) (An independent auditor does not owe fiduciary duties to its client as a matter of law). Deloitte was thus not a fiduciary of Apex based on their alleged relationship.

Although Apex has failed to show the existence of a fiduciary relationship based upon the type of relationship, Apex can still establish that a duty was owed based upon the nature of the relationship. Fiduciary duties are sometimes imposed on an *ad hoc* basis. *Burdett v. Miller,* 957 F.2d 1375, 1381 (7th Cir.1992). A fiduciary relationship can exist where the fiduciary exercises a significant degree of dominance over the other party. *Amendola v. Bayer,* 907 F.2d 760, 763 (7th Cir. 1990) (A fiduciary relationship requires an "influence and superiority over the other.") The facts here belie Apex's assertion that Deloitte exercised any dominance over Apex, however. Apex was represented by its own counsel in this transaction. Moreover, Apex employed a separate accounting firm to provide services relating to the purchase of Whitlock. (SAC Ex. A ¶ 14.1, SAC ¶ 45(d)(i).) The court affirms the Bankruptcy Court's ruling that Deloitte did not owe a fiduciary duty to Apex.

Apex's remaining two contentions are similarly unpersuasive. Apex notes, specifically that (1) Deloitte concealed the terms of an engagement letter between WSR and Deloitte, and (2) Deloitte concealed its involvement with WSR in the Whitlock transaction by providing responses to inquiries by Apex designed to put "Apex off the scent" of Deloitte's wrongdoing. (Appellant's Appeal Brief, at 22-24.) Specifically, Apex points to two Deloitte letters in response to Apex requests for information dated March 23, 1995 and May 31, 1995. (*Id.* at 24.) Significantly, both of these letters were received by Apex months before the October 5, 1995 letter was written stating Apex's intentions to continue to investigate the liability of WSR and Deloitte. The Bankruptcy Court, noting the chronology these letters correctly concluded, [c]learly as evidenced by the letter, Apex did not rely on those affirmative actions and thought there might still exist liability against Deloitte for its injury." (Opinion at * 7.) As the Bankruptcy Court concluded, Apex has failed to provide sufficient affirmative acts which support the tolling of the statute of limitations.

CONCLUSION

The court affirms the Bankruptcy Court's Memorandum Opinion and Order.

Dated: ENTER:

February 17, 2000 /s/ Rebecca R. Pallmeyer
REBECCA R. PALLMEYER
United States District Judge

APPENDIX 3

In The United States Bankruptcy Court
For The Northern District of Illinois, Eastern Division
Dated March 9, 1999

IN RE: APEX AUTOMOTIVE WAREHOUSE, L.P. an Illinois limited partnership, and THE WHITLOCK CORPORATION, a Minnesota corporation, Debtors.	)	No. 96 B 04594 96 B 04596 (Jointly Administered)
APEX AUTOMOTIVE WAREHOUSE, L.P. now known as THE WHITLOCK CORPORATION, Plaintiff v. WSR CORPORATION, and DELOITTE & TOUCHE, L.L.P. Defendants.	)	No. 96 A 1123 Judge Erwin I. Katz

MEMORANDUM OPINION

This adversary proceeding relates to the bankruptcy cases of Apex Automotive, L.P. ("Apex")

and The Whitlock Corporation ("Whitlock").[9] Apex has filed a Second Amended Complaint adding Deloitte & Touche L.L.P. ("Deloitte") as a defendant to its lawsuit against WSR Corporation ("WSR"). Apex asserts numerous counts against Deloitte. These counts are based on Deloitte's alleged active participation with WSR in a fraud perpetrated on Apex in connection with Apex's January 1995 acquisition of Whitlock.

This matter is before the Court on Deloitte's Motion to Dismiss or for Summary Judgment. For the following reasons, the Court grants the Motion for Summary Judgment.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1334 (b) and General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. This matter is a non-core proceeding under 28 U.S.C. § 157(c)(1). Venue is appropriate under 28 U.S.C. § 1409(a).

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[9] On February 22, 1996, Apex and Whitlock filed voluntary petitions for protection under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 et. seq. On September 24, 2996, Apex and Whitlock emerged from bankruptcy jointly as The Whitlock Corporation. This opinion continues to refer to Apex and Whitlock by their historical names to avoid confusion.

BACKGROUND

The following facts were taken from the 402M and 402N statements and Deloitte and Apex's briefs:

On January 27, 1995, Apex purchased all the outstanding shares of stock of Whitlock from WSR, pursuant to a Stock Purchase Agreement dated December 6, 1994 (the "Stock Purchase Agreement"). Prior to the acquisition, Apex was in the wholesale auto parts business; Whitlock operated retail auto parts stores.

As part of the purchase transaction, Apex and WSR agreed that WSR would strip about thirty of the retail auto parts stores out of the assets of Whitlock, prior to the sale. Because Apex was acquiring a newly configured Whitlock entity, WSR, as the seller, had to create financial statements to describe for Apex what it would be purchasing. Whitlock provided to Apex an unaudited, pro forma balance sheet of Whitlock as of September 3, 1994, which was attached to the Stock Purchase Agreement as Schedule 3.7.

Section 2.4 of the Stock Purchase Agreement required that, after the closing of the transaction, WSR was to prepare a balance sheet which accurately reflected the value of Whitlock as of the closing date of the transaction. This closing balance sheet was to include information necessary to determine a dosing book value for Whitlock as of the closing date. The closing balance sheet was to be audited by Deloitte. Apex and WSR agreed that the costs and expenses for the services of Deloitte in

conducting the audit would be shared equally by both. The closing balance sheet was never delivered to Apex.

Soon after the closing of the transaction, problems developed. Apex declared the following in its bankruptcy proceeding. "Almost immediately after the Acquisition, Apex found that the Acquisition had placed it and Whitlock into severe financial trouble for the simple reason that Apex has paid to much for Whitlock." Moreover, on or about April 25, 1995, Neal Tyson ("Tyson"), an outside accountant for Apex, sent a memorandum to David Carmell, president of Apex's general partner, stating that he had "come to the conclusion that what they did was to intentionally mislead you as to how they would value the inventory." Apex and Deloitte dispute who the term "they" refers to in the memorandum. In the memorandum, Tyson recommends that Apex consult its lawyers regarding its legal options.

Apex filed its first Complaint on October 5, 1995. Apex sought a declaratory judgment against WSR and Deloitte regarding a dispute among the parties about the appropriate manner to calculate certain items necessary to determine the closing book value. Apex sought declaration by the court, that the closing book value be calculated in accordance with Apex's wishes. The following year, in April 1996, Apex voluntarily dismissed Deloitte from the action. In October 1996, Apex filed an Amended Complaint to include a fraud count and several other counts against WSR.

On May 13, 1998, Apex sought leave to add Deloitte to this action. The Second Amended Complaint includes five Counts against Deloitte: fraud, negligence/accounting malpractice, breach of contract, breach of fiduciary duty and conspiracy to defraud. In sum, Apex alleges that WSR and Deloitte each knew, prior to the sale of Whitlock to Apex, that WSR's and Whitlock's books and records were grossly unreliable and inaccurate. Further, each misrepresented to Apex by affirmative false statements, by providing deliberately incomplete and misleading financial information, and by other omissions, the state of Whitlocks' finances in order to induce the sale and to inflate the sale price. After the closing of the transaction, Apex alleges that WSR and Deloitte participated in a scheme to continue to conceal the true condition of Whitlock from Apex. Lastly, Apex alleges that Deloitte had a fiduciary duty to disclose information to Apex of any problems with Whitlock's financial.

Deloitte moves to dismiss or for summary judgment on the basis of two arguments: (1) that all of Apex's claim against it are barred by a two year statute of limitations governing the case, and (2) that the breach of fiduciary duty claim should be dismissed for failure to state a claim because Deloitte's role was that of an independent auditor and thus Deloitte did not stand in a fiduciary relationship with Apex.

Deloitte relies on an October 6, 1995 letter from David Carmell sent to WSR and Deloitte for support

of its statute of limitations defense. The letter in part provides the following:

"Apex's lawyers are continuing their investigation into whether WSR and/or Deloitte face liability for damages arising from (1) an adverse material change in the condition of the business; (2) breaches of representations and warranties with respect to WSR's financial statements; (3) other omissions, errors and irregularities in WSR's books, records and audited financial statements; and (4) other breaches of the Stock Purchase Agreement."

Deloitte argues that the letter is uncontroverted proof that Apex was aware of possible claims arising from Deloitte's conduct in October 1995 and therefore the statute of limitations began to run then and expired two years later in October 1997. In other words, before Apex filed the Second Amendment Complaint adding Deloitte to its lawsuit pending against WSR.

Apex counters with several arguments: (1) that the statute of limitations had not run before it filed its Second Amended Complaint to include Deloitte because it was not triggered until 1997 when through discovery Apex allegedly learned of Deloitte's complicity; (2) that Deloitte actively prevented it from discovering Deloitte's involvement in the misrepresentation and therefore the doctrines of fraudulent concealment and equitable estoppel tolled the running of the statute of limitations; and lastly, (3) that the Motion to Dismiss the breach of fiduciary duty Count for

failure to state a claim should be denied because while independent contractors usually do not have fiduciary duty, Deloitte allegedly agreed to act as a advisor to Apex informing Apex of any problems with Whitlock's financial statements, and thus Deloitte was more than an independent auditor.

DISCUSSION

A motion for summary judgment in a bankruptcy matter is governed by the same standard applicable to civil proceedings. See Fed.R.Bankr. P. 7056 (incorporating Fed.R.Civ.P. 56). Accordingly summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, demonstrate the absence of a genuine issue of material fact." Fed. R. Civ. P. 56 (c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A–"genuine issue of material fact" exists if there is sufficient evidence for a jury to return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The court must evaluate the admissible evidence and inference therefrom in the light of most favorable to the nonmoving party. See id. at 255; *Liberles v. County of Cook*, 709 F.2d 1122, 1129 (7th Cir. 1983).

STATUTE OF LIMITATIONS

Illinois law provides the applicable statute of limitations for Apex's claims against Deloitte because "statute of limitations considerations are deemed 'procedural' requiring application of the forum state's law." *In re UNR Indus. Inc.*, 92 B.R. 319,

331 n.7 (Bankr. N.D. Ill. 1988) (citing Restatement (2d) of Conflicts of Laws S 142 (1972)). "In any event, the parties to a lawsuit can, without broad limits, stipulate to the law governing their dispute." *Cates v. Morgan Portable Bldg. Corp.*, 780 F.2d 683, 688 (7th Cir. 1985). Apex and Deloitte here have impliedly stipulated to the application of Illinois law by relying on Illinois law in their statute of limitations arguments. An implied stipulation is good enough *Id.*

The defendant Deloitte is a public accounting firm; therefore, the applicable Illinois statute of limitations for claims against Deloitte is found in 735 ILCS § 5/13-214.2(a) and read as follows:

> Actions based upon tort, contract or otherwise against any person, partnership or corporation registered pursuant to the Illinois Public Accounting Act, as amended or any of its employees, partners, members, officers or shareholders, for an act or omission in the performance of professional services shall be commenced within 2 years from the time the person bringing an action knew or should reasonably have known of such act or omission.

In Illinois, the "discovery rule" governs statutes of limitations such as 735 ILCS § 5.13/2.14.2(a). *City Nat'l Bank of Fl. v. Checkers, Simons & Rosner*, 32 F.3d 277, 282 (7th Cir. 1994). The effect of the discovery rule is to postpone the starting of the period of

limitations until the person knows or reasonably should know of his injury and also knows or reasonably should know that is was wrongfully caused. Id. at 283 (citing *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 415, 58 Ill. Dec. 725, 729, 430 N.E.2d 976, 980 (1982). At that time, the injured party is under an obligation to inquire further to determine whether an actionable wrong was committed. *Id.*

Apex contends that the statute of limitations did not begin to run in 1995 because it did not and could not know of Deloitte's complicity in WSR's fraud until document production in 1997. Upon reviewing the documents produced in 1997, Apex alleges it learned that Deloitte had known throughout the purchase negotiations to warn Apex, and that Deloitte, in fact, had helped to prepare that allegedly false financial information. Only then, Apex alleges, did it have reason to believe that Deloitte was a cause of Apex's injury and that Deloitte's conduct in participating in the fraud had been wrongful. Both parties cite to numerous cases to support their arguments but there is one Seventh Circuit case that deals with the precise issues at hand.

In *LeBlang Motors, Ltd. v. Subaru of America, Inc.*, 148 F.3d 680 (7th Cir. 1998), the court affirmed the dismissal of claims against two individuals added later as defendants to an existing fraud action, as time barred. The plaintiff's claims were based on an alleged fraud in its acquisition of a car dealership but the plaintiff had initially filed suit only against the employer of the two individuals. The plaintiff

later sought to add the two individuals. The court held that the fraud action accrued against "all potential defendants" when the plaintiff learned the information it had received before the acquisition was false. The court rejected the plaintiff's argument that its claims had accrued only against the company but not against the two individual defendants, until it learned, through discovery, of the two later-added defendant's complicity in the company's fraud. *Id.* at 691.

Similarly, Apex cannot contend that the claims it alleges against Deloitte did not accrue until Apex conducted discovery and became aware of Deloitte's complicity; that Apex did not know of Deloitte's complicity is irrelevant. *Id.* Under *LeBlang*, Apex's claims against Deloitte and all potential defendants began to accrue by October 1995, when Apex sent the letter to WSR and Deloitte stated that it was investigating their potential liability. This letter established that Apex believed at the time that it had been injured, and believed that the injury was caused by *inter alia* omissions, errors, irregularities and breaches of representations with respect to WSR's financial statements. Therefore, Apex knew both than an injury had occurred and that it was wrongfully caused; this knowledge is all that is required for the statute of limitations to begin running in Illinois. *Id.* That Apex believed that WSR misrepresented the financials of Whitlock is sufficient: this awareness triggered the "an obligation to inquire further to determine whether an actionable wrong was committed." *Id.*

A thorough investigation mandates that Apex consider the potential liability of all parties involved in supplying the financial information. *Id.* Deloitte was one such party; therefore, it should have been included in Apex's investigation.

Apex continues to allege that it did not know prior to discovery of Deloitte's assistance in preparing the unaudited pro forma balance sheet attached to the Stock Purchase Agreement. As in *LeBlanc*, Apex cannot suggest that it did not know of Deloitte's involvement since Apex asserts in its Second Amended Complaint that Deloitte had contractual and other duties to disclose information prior to Apex's acquisition of Whitlock; moreover, Apex asserts that prior to the closing Deloitte provide Apex with inventory-related workpapers for Whitlock and its audit report for fiscal year 1994, which supported and unqualified Deloitte audit opinion for the consolidated WSR entity as of January, 1994. Apex alleges that these documents and others were provided with the intention that Apex rely on them and that Apex did rely on them in deciding to purchase Whitlock; Apex also alleges that these documents were misleading. Therefore, even if Apex was not aware of Deloitte's alleged involvement in the preparation of the unaudited pro forma balance sheet, Deloitte participated in the flow of some financial information to Apex; thus, when there was a problem with the financial statements, Apex had a duty to investigate all the parties that had prepared financial information that Apex had relied upon. Apex's cause of action

accrued against both WSR and Deloitte in October 1995. Apex did not have the right to wait until years later, when pretrial discovery uncovered information that may have supported a cause of action against Deloitte. See *Singletary v. Continental Ill. Nat'l Bank & Trust Co.*, 9 F.3d 1236, 1243 (7th Cir. 1993) (applying Illinois statute of limitations in fraud action and holding "[t]he significance of [plaintiff] having known...that he had been wronged, even if he was not sure by whom, should thus be apparent knowing that he had been wronged, he was obligated as a reasonable person to begin inquiring as to who might have wronged him").

Apex disputes that *LeBlang* is directly apposite and relies on *Antell v. Arthur Anderson LLP*, 1987 WL 245878 (N.D. Ill.) as the applicable authority. In *Antell*, a putative class action was filed against the Discovery Zone and its officers for fraud in inflating the price of the company's stock by using false and misleading financial information; Arthur Andersen was the accounting firm that audited the financial statements of Discovery Zone and issued "clean" audit opinions. Several years later, Arthur Andersen, produced documents that indicated for the first time that Arthur Andersen acted with scienter in the alleged accounting manipulations. Based on this information the putative class representative sought leave to file an amended complaint asserting similar fraud claims against Arthur Andersen. Arthur Andersen argued that the claims were barred by a one year statute of limitation. Arthur Andersen argued that when the

class filed a claim against Discovery Zone, the class was on notice that Arthur Andersen as auditor of the purported fraudulent financial statements may have participated in the alleged fraud. The court held that the pleadings in the action against Discovery Zone did not conclusively put the class on inquiry notice of Arthur Andersen's supposed recklessness or intentional misconduct. The pleadings could have simply put the class on notice that Arthur Andersen acted in a negligent manner. *Id.* at *4.

An important fact that Apex fails to mention is that *Antell* was decided a month before *LeBlang*. Further, *Antell* is a District Court decision and *LeBlang* was decided by the Seventh Circuit Court of Appeals. Therefore, *LeBlang* is the latest authority and provides binding precedent for this court. Finally, although, not necessary, *Antell* can be distinguished because there is no evidence that the putative class was aware of reckless or intentional misconduct on the part of Arthur Andersen before document production. Here, on the other hand, the October 1995 letter indicates that Apex was investigating claims against Deloitte for similar conduct as that Apex later alleges in its Second Amended Complaint. The October 1995 letter mentions Apex investigation into Deloitte's liability for inter alia, omissions, errors and breach of representation in connection with the WSR financial statements. Thus, Apex possessed this knowledge before document production occurred.

FRAUDULENT CONCEALMENT AND EQUITABLE ESTOPPEL

Under *LeBlang*, it is clear that the statute of limitations began to run not after Apex's alleged discovery of Deloitte's complicity in 1997, but rather in October 1995; hence the two year limitations period expired in October 1997, before Deloitte was added to the lawsuit. The only hope for Apex is one of the doctrines that permit the running of a statute of limitations to be suspended or tolled even if the accrual date has passed. Apex invokes two: equitable estoppel and fraudulent concealment.

Equitable estoppel is a doctrine that tolls the running of a statute of limitations during any period in which the defendant took active steps to prevent the plaintiff from suing. *Singletary*, 9 F.3d at 1241 (citing *Witherell v. Weimer*, 118 Ill.2d 321, 113 Ill.Dec. 259, 263, 515 N.Ed.2d 68,.72 (1987)). The steps taken must have been affirmative efforts to delay the plaintiff from bringing suit before the statute of limitations has run. *Id.* This doctrine does not require an intent by the defendant to mislead, deceive or delay. Actions such as promising the plaintiff not to plead the statute of limitations pending settlement talks or actively concealing evidence constitute affirmative efforts sufficient to toll the statute. *Id.* Mere denial of liability or refusal to cooperate in making the plaintiff's case is insufficient. *Id.* Mere denial of liability cannot be the foundation of an equitable estoppel unless the defendant was in a fiduciary relationship with the plaintiff, entitling the latter to rely on the advice of

the former. *Id.* Apex alleges that both before and after the closing of the transaction, Deloitte intended to and did foster a relationship of trust with both WSR and Apex, occupying the position of an "honest broker" and independent intermediary. However, that one party trusts the other is insufficient to create a fiduciary relationship. "We trust most people with whom we choose to do business". *Pommier v. Peoples Bank Marycrest*, 967 F.2d 1115, 1119 (7th Cir. 1992).

Equitable estoppel is 'available only under limited circumstances." *Smith v. City of Chicago Heights*, 951 F.2d 834, 840 (7th Cir. 1992). To prove estoppel successfully, the plaintiff must show that the defendant's conduct was improper, and that the plaintiff was harmed by such conduct. *Id.* Among other factors courts should look for a "showing of the plaintiff's 'actual and reasonable reliance on the defendant conduct or representations' "and" 'evidence of improper purpose on the part of the defendant and the defendant's actual or constructive knowledge of the deceptive nature of its conduct." *Id.* at 841.

Apex also relies on the doctrine of fraudulent concealment. Fraudulent concealment is a doctrine that gives the injured party five years within which to bring a suit after he discovers the cause of action if a defendant has fraudulently concealed the existence of a cause of action. 735 ILCS 5/13-215; *Smith*, 951 F.2d at 840. Although sometimes used interchangeably with equitable estoppel, fraudulent concealment is "strictly a subset" of the latter, since

neither fraud nor concealment is required for equitable estoppel. *Singletary*, 9 F.3d at 1241.

Fraudulent concealment presupposes that the plaintiff has discovery, or, as required by the discovery rule, should have discovered, that defendant injured him, and denotes efforts by the defendant to prevent the plaintiff from suing in time. *Id.* at 841. There must be affirmative acts or representations which are calculated to "lull or induce a claimant into delaying filing of his claim or to prevent a claimant from discovering his claim." *Smith v. Cook County Hospital*, 164 Ill.App.3d 857, 862, 115 Ill. Dec. 811, 815, 518 N.E.2d 336, 340 (1st App. 1987). Mere silence on the part of the defendant or failure of the claimant to learn of the cause of action are not enough. *Id.* Fraudulent misrepresentations which constitute the basis of the claim do not amount to fraudulent concealment unless these actions tended to conceal the cause of action. *Id.* If the party affected by the fraud discovers the fraudulent concealment, or should have discovered it through ordinary diligence, and a reasonable time remains within the remaining limitations period, fraudulent concealment will not toll the running of the statute of limitations period. *Id.*

There are several events that Apex refers to as invoking fraudulent concealment or calling into issue equitable estoppel. However, only two of the events would constitute affirmative actions as required by the statute. One event concerns the creation of the unaudited pro forma balance sheet.

On March 8, 1995, Apex's controller and treasurer, Daniel Pastron ("Pastron") sent a letter to Deloitte regarding fifteen separate accounting issues, asking Deloitte to resolve these issues with WSR. On March 23, 1995, Deloitte wrote a letter stating:

In response to your letter dated March 8, 1995 to Jonathan Rothman of Deloitte and Touche, L.L.P. we have forwarded your letter to the management of WSR and asked them to respond to each of your issues. We will consider their response in connection with our audit. . . The balance sheet of The Whitlock Corporation is the responsibility of the management of Whitlock.

Through discovery an invoice of Deloitte was found dated January 31, 1995 which states: "For professional services rendered and expenses incurred in connection with assistance in preparing a pro forma, Whitlock West balance sheet and other services requested by you in assisting the purchaser in their due diligence." Deloitte admits that the invoice does contain the quoted language but Deloitte denies that it was responsible for the Whitlock West balance sheet referenced in the invoice. Deloitte cites to the AICPA Professionals Standards which contains U.S. auditing standards. AICPA allows and auditor to draft financials but confines the auditor's responsibility for the financial statements to the expression of his opinion on them. *AICPA Professional Standards*, AU ¶ 110 02. Irrespective of the audit standards, the letter does not constitute concealment. The second incident concerns when Pastron saw numerous errors in the

accounts payable and he sent a letter dated May 31, 1995 to WSR asking "how all the items we are finding incorrect got past your accounting department and Deloitte and Touche." Pastron remembers that it was either Deloitte or WSR who responded to his inquiry by claiming that Deloitte had no knowledge of this fact because it allegedly had not yet completed the accounts payable field work for its post-closing audit. Apex alleges that Deloitte's independence presence and its responses to Apex's inquiries put distance between Apex and any notion that Deloitte had behaved wrongfully and that Apex allegedly relied upon that conduct and those representations and was allegedly put off the scent in its inquiries to determine who did wrong.[10] Again, these are not acts of concealment. Further, neither of these incidents invoke the doctrines of fraudulent concealment or equitable estoppel. The actions that Apex alleges that Deloitte committed and which Apex relied on occurred in April and May of 1995. In other words, the actions occurred months before the October 1995 letter was written stating Apex's intentions to continue to

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[10] Apex also alleges that Deloitte failed to provide Apex with management letters that Deloitte submitted to WSR after its audits in 1993, 1994, and 1995. These management letter Apex alleges, demonstrated the inaccuracy and unreliability of WSR's financials. However, Apex asserts in its Second Amended Complaint, that it requested the management letter from WSR and not Deloitte.

investigate the liability of WSR and Deloitte. Clearly as evidenced by the letter, Apex did not rely on those affirmative actions and thought there might still exist liability against Deloitte for its injury.

CONCLUSION

For the above reasons, Deloitte's Motion for Summary Judgment on all Counts is granted.

Date:
March 9, 1999

Entered:

/s/ Erwin I. Katz
Erwin I. Katz
United States Bankruptcy Judge

APPENDIX 4

In The United States Bankruptcy Court
For The Northern District of Illinois, Eastern Division
Dated March 9, 1999

IN RE: APEX AUTOMOTIVE WAREHOUSE, L.P. an Illinois limited partnership, and THE WHITLOCK CORPORATION, a Minnesota corporation, Debtors.	)	No. 96 B 04594 96 B 04596 (Jointly Administered)
APEX AUTOMOTIVE WAREHOUSE, L.P. now known as THE WHITLOCK CORP., Plaintiff v. WSR CORPORATION, and DELOITTE & TOUCHE, L.L.P., Defendants.	)	No. 96 A 1123 Judge Erwin I. Katz

ORDER

IT IS HEREBY ORDERED that for the reasons stated in the accompanying Memorandum Opinion, Deloitte & Touche L.L.P.'s Motion for Summary Judgment on all Counts is granted.

Date: March 9, 1999

ENTERED:
/s/ Erwin I. Katz
ERWIN I. KATZ
United States Bankruptcy Judge

APPENDIX 5

In The United States Bankruptcy Court
For The Northern District of Illinois, Eastern Division
Dated March 29, 1999

IN RE: APEX AUTOMOTIVE WAREHOUSE, L.P. an Illinois limited partnership, and THE WHITLOCK CORPORATION, a Minnesota corporation, Debtors.	)	No. 96 B 04594 96 B 04596
THE WHITLOCK CORPORATION, formerly known as APEX AUTOMOTIVE WAREHOUSE, L.P. and THE WHITLOCK CORPORATION, Plaintiff v. WSR CORPORATION, and DELOITTE & TOUCHE, L.L.P. Defendants.	)	No. 96 A 1123 Judge Erwin I. Katz

ORDER

This cause coming on to be heard on Plaintiff's Motion to Amend Order to Include Rule 7054(b)

Certification (the "Motion"), due notice having been provided, and this Court being fully apprised in the premises,

IT IS HEREBY ORDERED:

(1) The Motion is hereby Granted,

(2) The Order docketed on March 12, 1999 incorporating the Memorandum Opinion of March 9, 1999 and granting Deloitte & Touche, L.L.P.'s Motion for Summary Judgment is stricken, and amended to include a Rule 7054(b) certification, as follows:

> "IT IS HEREBY ORDERED that for the reasons stated in the Memorandum Opinion of March 9, 1999, Deloitte & Touche L.L.P.'s Motion for Summary Judgment on all Counts is granted. In the event that this Order is deemed interlocutory, this Court expressly certifies the Order for immediate appeal pursuant to Rule 7054(b) of the Bankruptcy Rules of Procedure, and directs that it is a final order full adjudicating the rights and liabilities of Deloitte & Touche, L.L.P., one but not all of the defendants in this adversary case. There is no just reason for delay and judgment thereon is entered."

(3) This Order entirely supplants and replaces the Order docketed on March 12, 1999.

SO ORDERED:

/s/ Erwin I. Katz
Judge Erwin I. Katz
United States Bankruptcy Judge

ORDER PREPARED BY:

Gerald F. Munitz
Daniel P. Shapiro
Frederick H. Cohen
Roger A. Lewis
GOLDBERG, KOHN, BELL, BLACK,
ROSENBLOOM & MORITZ, LTD.
55 East Monroe Street
Suite 3700
Chicago, Illinois 60603
(312) 201-4000